Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1991

Mr. S. Calvin Capshaw
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211 E. Tyler
Bank One Building, Sixth Floor
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OR91-384

Dear Mr. Capshaw:

On behalf of the East Texas Council of Governments (ETCOG), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12348. The ETCOG has received a series of written requests from Mr. John Clark for various pieces of information relating to the procurement and installation of computer software by ETCOG and other matters. Mr. Clark's requests are summarized in chronological order in the table below.

LETTER # & DATE	INFORMATION REQUESTED
(1) April 12, 1991	(1) ETCOG policy statements regarding software acquisition and use; (2) List of software installed on ETCOG GIS or off-site computers
(2) April 17, 1991	"Global Distributorship Agreement"
(3) April 19, 1991	(1) List of all software "legally acquired by ETCOG within the last 5 years"; (2) Purchase order for each item so acquired; (3) Check representing payment of each item; (4) Publisher's registration for each item; (5) Listing of installation for each item; (6) List of all software installed on all ETCOG computers as of January 1, 1991; (7) List of all software installed as of the date of the request and the computer on which it is installed
(4) May 7, 1991	Correspondence, letters, memoranda, issued or received by ETCOG's Executive Director or Director of Regional Development and Services concerning reports, evaluations, or investigations of 21 enumerated items
(5) May 9, 1991	Agenda and minutes for all ETCOG "Executive Committee meetings, both regular and special session" for the 5 years ending May 2, 1991
(6) May 10, 1991	Copy, "in digital format," of list of software installed on ETCOG computers as of January 2, 1991

In previous correspondence we asked for information clarifying the timeliness of your request for an open records decision. We stated that your request letter of April 29, 1991, would not be considered timely with respect to Mr. Clark's first written request for information (dated April 12, 1991). We also noted that item 2 of Mr. Clark's April 12 letter appeared to be duplicative of materials requested by his letter of April 19, 1991. We advised that we would not consider your April 29 request timely with respect to the identical information requested in Mr. Clark's letters of April 12 and April 19.

You have since clarified the facts surrounding Mr. Clark's request of April 12. You inform us of a telephone conversation you had with Mr. Clark on April 17, 1991, in which you advised him that ETCOG did not have documents corresponding to the information requested in his first letter. You state that you specifically addressed the scope of Mr. Clark's second requested item, which was described in the April 12 letter as follows:

> A detailed listing of all software that has been installed on the above computers [ETCOG GIS computer system or off-site computers] with an indication as to whether it was installed in compliance with the licensee agreement and the copyright laws of the State of Texas and the United States or not.

Mr. Clark's third letter, dated April 19, 1991, refers to this conversation and, evidently in response to it, rephrases his request of April 12.

It appears from your description of the facts that there was genuine uncertainty as to the scope of Mr. Clark's first request for information. Mr. Clark's subsequent letter of April 19 was within the ten-day period following the first request. Mr. Clark's reference in the April 19 letter to your telephone conversation with him, and his apparent interest in clarifying the terms of the April 12 letter, make it clear that the operative date of Mr. Clark's request for information regarding software acquisitions and installations should be April 19, rather than April 12.

Given this sequence of events, we think it was not unreasonable for you to conclude that ETCOG's duty to request a decision of this office had not been triggered by Mr. Clark's letter of April 12. *Compare* Open Records Decision No. 333

(1982). Since your original letter requesting our decision was dated April 29, 1991, your request was timely filed with regard to this information. *Id.* Consequently, ETCOG is not required to make a compelling demonstration of reasons why information relating to software acquisitions and installations should not be made public.

You state that the other items covered by the requests of April 12 and 17 (ETCOG policy statements and the "Global Distributorship Agreement") could not be supplied because ETCOG has no documents corresponding to the specific information requested. Because these documents do not exist, ETCOG is under no duty to comply with the request. *See* Open Records Decision Nos. 458 (1987); 452 (1986); 342 (1982).

You contend that the requested information is excepted from required public disclosure by section 3(a)(3) of the Open Records Act. That provision applies to

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

V.T.C.S. art. 6252-17a, § 3(a)(3).

For information to be excepted by section 3(a)(3), two things must be shown. First, it must be established that litigation is pending or reasonably anticipated. Second, it must be demonstrated that the requested information relates to the anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Under this test, our review is directed to the relation of the subject matter of the requested information to the pending or anticipated litigation, not its relation to the litigation strategy of the attorney representing the governmental body. Open Records Decision No. 551 (1990). Where the attorney for the governmental body determines that the information relates to pending or anticipated litigation, this office's review will be confined to ascertaining whether that determination is reasonable in light of the facts. *Id.*

You advise that ETCOG is currently embroiled in a dispute with Mr. Clark regarding the performance of his obligations under a contract for computer services with ETCOG, and that ETCOG has made an offer to Mr. Clark in settlement of its claim against him. You state that you intend to recommend litigation against Mr. Clark if he declines the settlement. You also express your belief that Mr. Clark's requests are in pursuit of litigation he may be contemplating against ETCOG over these matters. For his part, Mr. Clark has submitted an affidavit to the effect that no litigation is contemplated against ETCOG.

Mr. Clark's affidavit raises a disputed question of fact which cannot be resolved by this office in an open records decision. Open Records Decision No. 554 (1990). Furthermore, because the Open Records Act does not grant this office the authority to take evidence or to test its authenticity, we have no occasion to consider the effect of Mr. Clark's affidavit on his requests for information vis-a-vis any claim he may assert against ETCOG. You have determined that the requested information relates to a claim Mr. Clark may assert against ETCOG. We believe, on the basis of the facts you have submitted, that this determination is reasonable. Consequently, the test for section 3(a)(3) has been met in this instance.

We note that Mr. Clark's fifth letter requests the agenda and minutes for all ETCOG "Executive Committee meetings, both regular and special session," for the five years ending May 2, 1991. The minutes and agendas of public meetings of governmental bodies subject to the Open Meetings Act are available to the public and may not be withheld under section 3(a)(3). *See* V.T.C.S. article 6252-17, § 3B; Open Records Decision No. 221 (1979).

However, we need not resolve whether ETCOG is subject to the Open Meetings Act. *See* V.T.C.S. art. 6252-17, § 1(c) (definition of "governmental body"); Local Government Code ch. 391 (regional planning commissions); Attorney General Opinion JM-183 (1984) (advisory council of a regional library system created pursuant to V.T.C.S. art. 5446a, a "hybrid body" comprised of representatives of participating cities and counties, was not subject to Open Meetings Act). We are advised by Mr. Glynn Knight, Executive Director of ETCOG, that ETCOG routinely distributes copies of the minutes and agenda of meetings of the ETCOG Executive Committee to the media. Once a governmental body selectively discloses to the public information covered by section 3(a)(3), the exception may not later be invoked to withhold the information. Open Records Decision No. 454 (1986) (overruled in part on other grounds by Open Records Decision No. 468 (1987)). Accordingly, we conclude that with the exception of the

agenda and minutes routinely made public by ETCOG, the information requested by Mr. Clark may be withheld pursuant to section 3(a)(3).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-384.

Yours very truly,

Steve Aragon
Assistant Attorney General
Opinion Committee

SA/mc

Ref.: ID#s 12111, 12411, 12451, 12529, 12553, 12952, 13036, 13147

cc: Mr. John S. Clark
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